MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-348

UNITED STATES OF AMERICA,

Respondent,

vs.

DAVID JOHN ODLAND,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN H. LAUERMAN
FRANKLYN M. GIMBEL

Attorneys for David John Odland

900 MGIC Plaza
270 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 271-1440

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Orders	2
Date of Judgment	2
Statutes Involved	2
Question Presented for Review	3
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	5
Appendix	
Statutes Involved	1a-4a
Opinion of the Seventh Circuit Court of Appeals, dated August 21, 1974	5a-12a

CITATIONS

Cases:

United States v. Doe, 472 F. 2d 982 (2nd Cir. 1973)	4
United States v. Sohnen, 298 F. Supp. 51 (1969)	4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

UNITED STATES OF AMERICA,

Respondent,

vs.

DAVID JOHN ODLAND,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID JOHN ODLAND petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on August 21, 1974.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals dated August 21, 1974, is printed in the Appendix pp. 5a-12a.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1254.

ORDERS

Upon application of Defendant-Appellant, the United States Court of Appeals for the Seventh Circuit, on September 13, 1974, stayed the issuance of the mandate of that Court for a period of Thirty (30) days pursuant to Rule 41(b), Federal Rules of Appellate Procedure.

Application has also been made for an extension of time in which to file this Petition.

DATE OF JUDGMENT

Judgment was entered by the Clerk of the United States Court of Appeals for the Seventh Circuit on August 21, 1974.

STATUTES INVOLVED

Fourth Amendment, United States Constitution

19 C.F.R. 1626

39 C.F.R. 61.1

19 U.S.C. 482

19 U.S.C. 1582

21 U.S.C. 952(a)

21 U.S.C. 960

39 U.S.C. 3623(d)

(Full text of statutes appears in Appendix)

QUESTION PRESENTED FOR REVIEW

Whether there are any legal limits to the authority of customs officials to open an envelope in first class mail from a foreign country to a U. S address?

STATEMENT OF THE CASE

Odland was indicted for importing 8.8 grams of cocaine into the United States from Colombia, in violation of 21 U.S.C. 952(a) and 960. After a court trial, he was convicted. The conviction was affirmed by the Seventh Circuit Court of Appeals.

On or about May 1, 1973, New York customs officials opened an envelope addressed to Patsy Klein, c/o Daniel Schwartzman, 11990 Long Lake Drive, Wind Lake, Wisconsin 53185, U.S.A., from Medellin, Colombia. The envelope was found to contain 8.8 grams of a substance suspected to be cocaine. This first class envelope was thick, red in color, and was found to contain a cardboard greeting card.

In its decision, the Seventh Circuit found the envelope to be subject to search for the sole reason that the envelope was entering the United States from abroad. There were no other facts nor suspicions particular to this envelope. The court itself characterized this govenmental action as a "sweeping power to search" and denominated it as constitutional.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court has not expressed itself on the state of the law regarding the power of customs officials to search first class mail addressed to

a United States addressee from abroad. Confusion now exists as to whether such mail should be treated in the same way as a person entering the country at its borders, as such a person's baggage, or as domestic first class mail. Should such mail be entitled to a right of privacy of the sender and/or the addressee? Does the Fourth Amendment to the United States Constitution have application to such persons or property? Must some standard of state of mind be achieved before such mail can be opened? The fact of the lack of answers to the questions herein raised dramatically demonstrates the quandary one finds in trying to express the state of the law.

If this Court does not give direction to United States customs officials, they could and would be able to act upon whim or fancy in exercising uncontrolled power.

Congress has extended enlarged authority in the area of customs searches generally. Whether that authority when exercised is constitutionally firm must be judicially determined.

Various Circuits which have faced questions dealing with customs searches have not formulated a standard applicable to searches of mail. Suggestions have appeared in certain decisions that mail in envelopes should enjoy more protection from unrestricted searches than packages. *United States v. Doe,* 472 F. 2d 982 (2nd Cir. 1973), reciting 19 U.S.C. 482, and *United States v. Sohnen,* 298 F. Supp. 51, at page 55 (1969).

> "The government's power to search international mail for customs purposes is not unlimited. The Constitution at least prevents harsh and demeaning searches on mere suspicion, and it may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

If the foregoing language of the District Court in the *Sohnen* case is a reliable gauge of the law, then the Circuit Court for the Seventh Circuit is clearly wrong in its decision in this case. A choice between the result of *Odland* and its underlying rationale and the more restrictive rationale of *Sohnen* must be made by this Court.

CONCLUSION

On the basis of the substantive issues raised herein, I respectfully request that this Court grant the Petition.

Respectfully submitted,

JOHN H. LAUERMAN
FRANKLYN M. GIMBEL
Attorneys for David John Odland
900 MGIC Plaza
270 East Kilbourn Avenue
Milwaukee, Wisconsin 53202

APPENDIX

21 U.S.C. 952(a)

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. 960

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this

title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b) (1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms

and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

19 U.S.C. 482

"[O]fficers * * * authorized to * * * search vessels may * * * search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is [dutiable goods or contraband]."

39 U.S.C. 3623(d)

(d) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

19 U.S.C. 1582

"The Secretary of the Treasury may prescribe regulations for search of persons and baggage * * * and all persons coming into the United States from foreign countries shall be liable to detention and search * * * under such regulations."

19 C.F.R. 162.6

"All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer."

39 C.F.R. 61.1

"All mail originating outside the customs territory of the United States is subject to customs examination, except [certain mail addressed to diplomats, international organizations and government officials.]"

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-2124

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID JOHN ODLAND,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 73-CR-198
MYRON L. GORDON, *Judge.*

ARGUED JUNE 4, 1974 — DECIDED AUGUST 21, 1974

Before CLARK,* *Associate Justice*, CUMMINGS and TONE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendant was indicted for importing 8.8 grams of cocaine into the United States from Colombia, in violation of 21 U.S.C. §§ 952(a) and 960. After a bench trial he was convicted and received a two-year sentence; in addition a special parole term of three years was imposed under 21 U.S.C. § 960.

Defendant's first argument is that about May 1, 1973, New York customs officials acted improperly in opening an envelope addressed to Patsy Klein, c/o Danial Schwartzman, 11990 Long Lake Drive, Wind Lake, Wisconsin 53185, U.S.A. from Medellin, Colombia. The envelope was found to contain 8.8 grams of a substance suspected to be cocaine. According to the record, this inspection occurred during the routine examination of

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

mail parcels and envelopes arriving in the United States from abroad. We have examined the first class envelope in question and note that it is a thick red envelope enclosing a cardboard greeting card.

In denying reconsideration of its earlier order refusing to suppress evidence, the district court stated: "I think the right of a Customs authority to inspect at random is implicit in the way the country protects itself from untaxed invasions [importations]. It's also a proper way, in my judgment, for the Government to protect itself from the intervention of contraband. So I find no—I have no difficulty with the original opening of the letter at New York." We agree that the United States Bureau of Customs in New York was empowered to open this envelope as part of its continuing investigation of narcotics smuggling from foreign countries into the United States.

Defendant contends that the search was impliedly forbidden by 19 U.S.C. § 482. That statute provides:

> "[O]fficers • • • authorized to • • • search vessels may • • • search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is [dutiable goods or contraband]."

We need not decide what constitutes "reasonable cause to suspect." This statute authorizes border searches; it also authorizes the search of trunks and envelopes "wherever found." It may be that when conducting searches away from the border, customs officials can rely only on this statute, and that the requirement of "reasonable cause to suspect" is then a limitation on their powers. But when searching at the border, customs officials may also rely on other statutes. For example, 19 U.S.C. § 1582 provides:

> "The Secretary of the Treasury may prescribe regulations for search of persons and baggage • • • and all persons coming into the United States from foreign countries shall be liable to detention and search • • • under such regulations."

The implementing regulation is 19 CFR § 162.6, which reads in part:

> "All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer."

International mail is subject to a similar scheme of regulation. The statute guaranteeing confidentiality to first class mail applies only to mail "of domestic origin." 39 U.S.C. § 3623(d). The relevant regulation is 39 CFR § 61.1, which provides:

> "All mail originating outside the customs territory of the United States is subject to customs examination, except [certain mail addressed to diplomats, international organizations and government officials.]"

It is clear that this regulation authorized the search involved here. The envelope was subject to search at the border merely because it was entering the United States from abroad; no other fact, and no suspicion particular to this envelope, is necessary under the regulation.

We also conclude that this sweeping power to search is constitutional. Surprisingly, it appears that the Supreme Court has never been required to determine the permissible scope of searches of persons or goods entering the United States from aboard. Nor has this Court had many occasions to consider the issue, though we have indicated that border searches are different from other searches. See *United States* v. *Kurfess*, 426 F.2d 1017, 1020 (7th Cir. 1970); *United States* v. *De La Cruz*, 420 F.2d 1093, 1095 (7th Cir. 1970). We therefore turn to the settled law of the Circuits which deal with border searches regularly.

There is substantial authority in those Circuits stating the power to search at international borders in the same sweeping terms as the regulation. Any person or thing coming into the United States is subject to search by that fact alone, whether or not there be any suspicion of illegality directed to the particular person or thing to be searched. *Klein* v. *United States*, 472 F.2d 847, 849 (9th Cir. 1973); *United States* v. *McDaniel*, 463 F.2d 129, 132 (5th Cir. 1972); *United States* v. *Stornini*, 443

F.2d 833, 835 (1st Cir. 1971). This rule is supported by dicta in Supreme Court opinions:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile * * *. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 153-154.
>
> "[I]t is clear that the [First Congress] did not regard searches and seizures [to collect duties] as 'unreasonable,' and they are not embraced within the prohibition of the [fourth] amendment." *Boyd* v. *United States*, 116 U.S. 616, 623.

See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272.

We conclude that the 1st, 5th and 9th Circuit cases cited above correctly state the law of border searches, and that mail is not exempt. Accordingly, the Government is free to spot-check incoming international mail at the port of entry, or to inspect all such mail, or to inspect any such mail which attracts the inspector's attention. We therefore do not reach the Government's alternative contention that this envelope and greeting card appeared suspicious. In holding that crossing a border is sufficient under the Fourth Amendment to justify this search, we of course express no view on what have been termed extended border searches or intrusive personal searches. See generally Note, "Border Searches and the Fourth Amendment," 77 Yale L.J. 1007 (1968).

We note that other courts which have considered searches of incoming international mail have reached similar results, although the Government advises that no previous case involved opening a first class letter. *United States* v. *Doe*, 472 F.2d 982 (2d Cir. 1973); *United States* v. *Galvez*, 465 F.2d 681 (10th Cir. 1972); *United States* v. *Beckley*, 335 F.2d 86 (6th Cir. 1964); *State* v. *Gallant*, ... Me. ....., 308 A.2d 274 (1973); *United States* v.

Feldman, 366 F. Supp. 356 (D. Haw. 1973) (collecting cases).

Defendant's next point is that the affidavits were insufficient to support the search warrant for the Wind Lake, Wisconsin, residence where the incriminating materials were found.

The first affidavit was of Special Agent Wingert of the Bureau of Customs in Milwaukee. The affidavit stated that for eleven years part of his duties consisted of investigating the smuggling of narcotics into the United Staes. About May 1st, his Milwaukee office was advised by the New York office of the Bureau of Customs that the previously discussed envelope "was found to contain approximately 8.8 grams of suspected cocaine." Also about May 1st, according to the affidavit, the envelope was forwarded in a certain locked mail pouch to the Postal Inspector in Madison, Wisconsin. Wingert examined the envelope and obtained a positive result upon testing it for cocaine content.

The second supporting affidavit was by Lee Wittke, a detective for the Racine County, Wisconsin, Sheriff's Department. Wittke reported that on May 15th he observed the residence to which the envelope was addressed and noted that its mailbox was located by the road. He concluded by stating he knew that the envelope in question was to be delivered to the residence on May 16th.

Based on these two affidavits, a search warrant was issued on May 15th by a Racine County Court Commissioner, requiring return of the warrant within 48 hours thereafter and authorizing a search of the premises at 11990 Long Lake Drive on the basis of the foregoing information. The Commissioner stated in the warrant that he had been informed by Wingert and Wittke that in the cottage in question "there will be located and concealed certain things, to wit: an envelope addressed to Patsy Klein, care of Danial Schwartzman, 11990 Long Lake Drive, Wind Lake, Wisconsin 53185 U.S.A. containing 8.8 grams of suspected cocaine (possessed for the purpose of evading or violating the laws of the state of Wisconsin and contrary to section 161.41(2)(R) of the Wisconsin statutes) * * *."

Since Wittke's affidavit had stated on his own knowledge that the envelope was to be delivered to "11990 Long Lake Drive" on May 16th, it was permissible for the Commissioner's warrant to state his understanding that it would thereafter be "located and concealed" in the cottage. Therefore, we cannot subscribe to defendant's argument that the Commissioner would have to assume the envelope would be deposited in the roadside mailbox rather than delivered to the door of the residence. From the Wittke affidavit, the Commissioner was justified in concluding that the Government contemplated a controlled, personal delivery to the residence. Even if he thought that the delivery was to be to the mailbox, he could properly find probable cause to believe that the residents would pick up their mail and carry it into the cottage.

We hold that the two affidavits contained probable cause for the Commissioner to authorize the search of the residence within 48 hours from the issuance of the search warrant. *United States* ex rel. *Beal* v. *Skaff*, 418 F.2d 430 (7th Cir. 1969); *United States* v. *Feldman*, 366 F. Supp. 1 (D. Haw. 1973) (collecting cases).

During their search of the Wind Lake residence, Agent Wingert and Detective Donald Parker discovered three opened letters (Exhibits 3, 4 and 5) in a bedroom of the residence. Two of the letters were postmarked Medellin, Colombia, the same postmark as on Exhibit 2, the envelope opened in New York; the third bore postage from Curacao. The handwriting on all three was also similar to the New York one.

Immediately thereafter, they recovered Exhibit 2, the subject of the indictment, in the top drawer of a dresser in the same bedroom. Exhibit 6, a similar envelope postmarked Medellin, Colombia, addressed to Patsy Klein, c/o Danial Schwartzman at the Wind Lake residence, was discovered with Exhibit 2. When opened, it was found to contain 5.83 grams of cocaine with another greeting card.

Defendant objected to the seizure of Exhibits 3, 4, 5 and 6, and their subsequent admission into evidence on the ground that their seizure was beyond the scope of

the search warrant. However, Exhibits 3, 4 and 5 were discovered prior to finding Exhibit 2, the letter specifically described in the search warrant. Exhibit 6 was found alongside Exhibit 2 in the same room as Exhibits 3, 4 and 5. Once the item particularly described in the search warrant is found, the search must end, but other evidence or contraband found in the course of a proper search for the item particularly described may be seized. Here all four contested exhibits appeared on their face to have a nexus with the crime under investigation. Therefore, they were properly seized and, when they proved to be incriminating, admitted into evidence. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971); *United States* v. *Kane*, 450 F.2d 77, 85 (5th Cir. 1971).

Defendant's final point is that he was not sufficiently identified to sustain the conviction. The district judge concluded from the evidence that "there is a very definitive web that envelopes Mr. Odland." He explained his conclusion that Odland was sufficiently identified as follows:

> "I think the coincidence of the name on Exhibit 4, being addressed to 'Danial Schwartzman' on the envelope and being addressed to 'David' in the content, is part of a, as Mr. Bukey [the prosecutor] very cogently argued—part of a web which suggests that the Dabong identities and the Danial Schwartzman identities are but pseudonyms or 'phony names,' as they are called in the correspondence for defendant.
>
> "The expression in Exhibit 4, saying 'Your letter was a true Dabong Letter,' tends to support the belief that this was a calculated technique to avoid using correct names and to use pseudonyms; nevertheless, the Court has given great attention to the fact of the question as to whether Danial Schwartzman and Dabong are in fact Mr. Odland. The two principal pieces of evidence that suggest that he is, are the fact that he did receipt for the letter addressed to Patsy Klein, and he did so by signing 'Patsy Klein by Schwartzman.'

> "• • • But when we add to that the 'David' on the Exhibit 4 and add to that the coincidence of David Odland being the man who received the letter and who bears the name David, we get what I consider to be a irresistibly persuasive web which has so enveloped David Odland as to justify, in my judgment, a finding of proof by the Government beyond a reasonable doubt.
>
> "I have no reasonable doubt that the defendant, David John Odland, is indeed the addressee of these five communications, 2 through 5—2 through 6, excuse me. Accordingly, the Court finds the defendant guilty and enters a judgment of conviction."

Our review of the evidence satisfies us that the trier of fact could properly find the defendant was the same person as Danial Schwartzman and "Dabong." Since three of the letters (Exhibits 3, 4 and 5) set out the scheme for defendant's importation of the cocaine in the envelopes enclosing the two greeting cards (Exhibits 2 and 6), sufficient evidence was presented to support the conviction.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.